A STUDY IN THE LAW OF TORTS.

THE owner of a tract of land which was bounded on two sides by a circuitous river, brought six separate actions against six mining companies, to recover compensation for alleged damage done to the land by the deposit of tailings from the tin mines of the six defendant companies into the river, and the subsequent carriage of a portion of such tailings on to the land by the river in flood-time. The portion of the tailings which was carried on to the land by the river was deposited on it in the form of a fine red silt which made a layer of red soil on the surface of the land, varying in thickness in accordance with the contour of the land. By the consent of all the parties the six separate actions were tried together, without a jury, and in each case the trial resulted in a judgment in favor of the defendant company. The land was let to a tenant who used it for pastoral purposes, and who had occupied it for more than six years before the commencement of the actions; and the ground of the judgment, in each case, was that the evidence did not prove that a quantity of silt sufficient to cause any appreciable damage to the plaintiff's reversionary interest in the land had come from the tailings deposited in the river by the defendant company. The silt which came from the mines of several of the defendant companies was not composed of any ingredients deleterious to the land of the plaintiff. On the contrary, it was composed of ingredients that would have made it a beneficial addition to the land if it had been deposited on it in convenient quantities at a convenient season of the year; and it did not appear that the silt which came from the mine of any of the other defendant companies was of a character positively deleterious to the plaintiff's land.

The several mines of the six defendant companies were situated at distances varying from six to forty miles above the plaintiff's land, as measured by the course of the river; and the mine nearest to the plaintiff's land was a very small one, from which a very small quantity of tailings had been deposited in the river. The next nearest mine was about twelve miles above the plaintiff's land, and it had been worked on a much smaller scale of operations than that on which mining operations had been conducted in the mines

above it. Judging from the color and composition of the silt deposited on the plaintiff's land, the greater part of it appeared to have come from the mines more than thirty miles above the land.

The character of the damage which the plaintiff alleged to have been caused to his land by the deposit of the silt upon it was a repeated interference with the natural growth of the herbage growing on it, and a repeated covering of the herbage with a thin layer of silt which prevented the cattle from eating it until subsequent rains had washed the silt from it; in consequence of which he had been compelled to reduce the rent of the land, and had therefore sustained pecuniary loss through the conduct of the defendant companies.

The refusal of the tenant to continue to pay the same rent which he had previously paid for the land was relied upon by the plaintiff as conclusive evidence that his reversionary interest in the land had been appreciably injured. But in the cases of Mumford *v.* The Oxford, Worcester and Wolverhampton Railway Company[1] and Simpson *v.* Savage[2] it was definitely decided that the relinquishment of a property by a tenant, in consequence of the tortious conduct of the occupier of an adjoining property, and the inability of the owner of the relinquished property to obtain another tenant at the same rent as that paid by the previous tenant, was not sufficient proof *per se* of such a permanent injury to the property as would enable the owner of it to maintain action for damages in respect of his reversionary interest in it. In each of those cases the tenant could undoubtedly have maintained an action for the inconvenience and discomfort suffered by him in consequence of the conduct of the defendant; and in each of the six cases now under review the tenant could have undoubtedly maintained an action against the defendant company for a technical trespass at the least, and he could also have maintained an action for substantial damages, if in any one of the six cases he could have proved that he had suffered appreciable damage from a repeated interruption of his ordinary use of the land, by the deposit of only so much silt as could be reasonably supposed to have come from the mine of the particular defendant. But the owner of the land failed, in each of the six cases, because the judge came to the conclusion that the evidence did not establish the allegation of anything in the nature of a permanent or continuing damage to the land in consequence of the separate conduct of the particular defendant.

[1] 1 H. & N. 34. [2] 1 C. B. (N. S.) 347.

If all the mines on the banks of the river had belonged to one company, or if they had been worked in conjunction in such a manner that the deposit of tailings in the river from any one of them was an act performed with the knowledge and for the benefit of the owners of all of the other mines, the plaintiff undoubtedly would have had a good cause of action against the single company, or the combination of companies, as the case might be. But each of the six defendant companies, in the cases above mentioned, was conducting its mining operations quite independently of all the other defendants, and none of them could be said to be legally cognizant of the operation carried on by any of the others. In such a case it seems that the owner of a reversionary interest in any land that is leased for a term of years to a tenant, and which is substantially injured by the aggregate operations of several persons who have acted independently of one another, cannot join any two or more of such persons as defendants in a single action for damages, and is therefore without a remedy in the nature of an action for compensation, if he cannot prove that an appreciable portion of the injury done to his land has been caused solely by the conduct of the single defendant in any action he may bring to obtain compensation for the loss he has sustained.

The evidence produced by the six defendant companies in the six cases now under review clearly proved that a much larger quantity of tailings than the total amount deposited by them in the river had been deposited in it by other companies and by a number of single persons, in the working of mines which had been abandoned some years before the actions were commenced; and that only a small portion of the tailings deposited in the river from time to time, in the working of a mine thirty or twenty miles above the plaintiff's land, would be carried by the river so far down its course, within a period of six years from the time of deposit of it in the river. An inspection of several miles of the bed and banks of the river demonstrated conclusively that a very large portion of the total quantity of tailings deposited in the river, during the previous twenty years, had remained permanently in the bed of the river, and had raised the level of it, in many places, as much as seven or eight feet above the original level of it. It was also proved that it was not until mining operations had been carried on for some years in several mines situated on the banks of the river, that any appreciable quantity of silt had appeared on the plaintiff's land. From these facts, and from a large quantity of expert evidence in

reference to the character and condition of the bed and banks of the river and the operation of floods upon the tailings deposited into it, the judge arrived at the conclusion that the silt appearing from time to time upon the plaintiff's land, in any case in which it came from a mine twenty miles or more distant, came from tailings that had been deposited in the river some years before the silt reached the land, and that silt would also be carried from time to time on to the plaintiff's land from the banks of the river independently of any mining operations. The quantity of silt carried on to the plaintiff's land from the banks of the river, without any disturbance of them by mining operations, would usually be very small, in fact almost imperceptible; but it was proved that on several occasions, within a period of ten or twelve years before the commencement of the actions, very heavy floods had torn away large quantities of soil from both banks of the river nearer to the plaintiff's land than the mines of some of the defendant companies. It was, therefore, a very safe inference that on several occasions, within the six years immediately preceding the commencement of the actions, some of the silt deposited on the plaintiff's land had come from the banks of the river.

In view of the conclusion of fact at which the judge arrived, in reference to the quantity of silt brought on to the plaintiff's land from the mine of any one of the six defendant companies, within a period of six years before the commencement of the actions, it was impossible for him to declare that the conduct of any one of the defendant companies, regarded apart from the contemporaneous conduct of the other defendants, had caused any injury to the plaintiff's reversionary interest in the land. It was also very problematical whether the total quantity of tailings deposited by all the six defendant companies in the river, within any particular period of six years, would have caused any substantial and continuing damage to the plaintiff's land, if there had not been any other tailings deposited at any time in the river from other mines. But, assuming that the total quantity of soil brought down on to the plaintiff's land by the river from all the mines of the six defendant companies, and from all the other mines which were being worked on the banks of the river at the same time, was sufficient to cause a substantial and continuing injury to the plaintiff's land, the important question suggested by the judgment in each case is, whether the plaintiff could have obtained an injunction to restrain the owners of the several mines from continuing to deposit silt in

the river, if the quantity coming from any one of the mines was insufficient to cause any actionable injury to his reversionary interest in the land.

There is ample judicial authority in support of the proposition that the equitable remedy of an injunction is always a concurrent remedy for a wrong actionable under the common law. In the case of White *v.* Mellin,[1] Lord Herschell said, in reference to the application made in that case for an injunction to restrain the further publication of an advertisement which the plaintiff alleged was disparaging to an article manufactured by him, "My Lords, obviously to call for the exercise of that power, it would be necessary to show that there was an actionable wrong well laid, and if the statement only showed a part of that which was necessary to make up a cause of action — that is to say, if special damage was not shown — a tort in the eye of the law would not be disclosed, the case would not be within those provisions, and no injunction would be granted." In the same case Lord Watson said, "Damages and injunction are merely two different forms of remedy against the same wrong; and the facts which must be proved in order to entitle a plaintiff to the first of these remedies are equally necessary in the case of the second." And, in direct reply to the argument of the plaintiff's counsel, Lord Morris said, "But it was said that although an action for damages could not be sustained an injunction in equity could be obtained. It would certainly be a strange and novel chapter of equity if a party could get a perpetual injunction to restrain an act which is not an illegal act." Judicial language could not be more emphatic in regard to any proposition which it enunciated. But in the case of White *v.* Mellin it was only the conduct of a single defendant which was under the consideration of the court, and the plaintiff did not prove that he had suffered any positive damage, or that the conduct of the defendant was *per se* an invasion of any legal right vested in the plaintiff. If the circulation of the advertisement published by the defendant had caused any diminution in the volume of the plaintiff's business, the case was an example of *damnum sine injuria.* In any such case, the emphatic language used by several of the judges in reference to the necessity of proof of an actionable wrong in order to support an application for an injunction would always be justified and appropriate. But it has never been judicially decided

[1] [1895] A. C. 154.

that an injunction will not be granted in any case in which the result of the simultaneous conduct of a number of defendants, acting independently of one another, is to produce positive damage to the property of the plaintiff, if the conduct of each of the defendants is separately innocuous to the plaintiff. On the contrary, in the two cases of Thorpe *v.* Brumfitt[1] and Blair *v.* Deakin,[2] it was decided that two or more persons, acting independently in the pollution of a river, can be joined as defendants in one suit for an injunction to restrain them from continuing to pollute it to the detriment of the plaintiff, although the matter deposited in the river by any one of them would not produce any appreciable pollution of it. It was also decided in the case of Lampton *v.* Mellish[3] that two or more persons, acting independently of one another, could be joined as defendants in a suit to restrain them from making a noise to the discomfort of the plaintiff, although the noise made by one of them alone would not have caused any serious inconvenience to the plaintiff.

In the last three mentioned cases the conduct of each defendant was technically an invasion of a legal right vested in the plaintiff. But in a jurisdiction in which the same tribunals take cognizance of both legal and equitable rights, and administer simultaneously legal and equitable remedies, there does not seem to be any sufficient reason why a substantial injury to a reversionary interest in land should not be regarded as a remediable wrong, although it may be produced by the simultaneous conduct of a number of persons in circumstances in which the separate conduct of each of them is not an actionable invasion of any present right of the reversioner; if the separate conduct of each of the contributors to the injury to the reversioner's interest in the land is an actionable invasion of a legal right of the person in immediate possession of it. If the injury inflicted in such a case upon the reversioner's interest in the land is not a remediable wrong, it is *damnum sine injuria.* But in all cases in which *damnum sine injuria* is recognized as such by the law, the *damnum* is produced by the exercise of a legal right vested in the person whose conduct causes it. If in any case *damnum* is suffered by any person as an immediate consequence of the conduct of another person which is not an exercise of a legal right vested in him, such conduct is *injuria*, or in other words is an actionable invasion of a legal right of the person who

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[1] L. R. 8 Ch. 650. [2] 57 L. T. 522. [3] [1894] 3 Ch. 163.

has suffered *damnum* in consequence of it. In the case of substantial damage done to a reversionary interest in land by the simultaneous conduct of a number of persons in the circumstances above mentioned, the *damnum* would not be produced by the exercise of any legal right vested in the several contributors to it, if the person in immediate occupation of the land would have a good cause of action against them for damage to his interest in it. On the contrary, the conduct of each of the contributors to the damage would be a direct invasion of a legal right vested in the person in immediate possession of the land, and would therefore be intrinsically an actionable wrong in relation to him, and if in such a case the reversionary interest of the owner of the land is also injuriously affected, it is difficult to see why each contributor to the damage should not be restrained by injunction from continuing to contribute to it, when an injunction is obtainable, in cases like Thorpe *v.* Brumfitt, Blair *v.* Deakin, and Lampton *v.* Mellish, to restrain each contributor of an inappreciable quota to a substantial nuisance.

The common law does not provide preventive remedies, because its purview does not extend beyond deeds done and the results produced by them; and it does not impose any liability on any person for any deed not done by him, or authorized or adopted by him, in any manner or degree, or by any person to whose legal rights and liabilities he has succeeded by operation of law. Nor does equity, when it restrains by an injunction several persons who have been acting independently of one another, impose on any of them any responsibility for the conduct of any of the others. There is, therefore, not any conflict between the common law and equity in this matter, in regard to the distribution of liability for the results of the aggregate conduct of two or more persons. But equity will frequently restrain a person from pursuing conduct which does not *per se* produce damage to any other person, when an extension of such conduct would produce actionable damage to another person. In every such case there is doubtless a threatened or an imminent invasion of a legal right of the plaintiff. But in the case of Blair *v.* Deakin Mr. Justice Kay said that an injunction could be obtained to restrain the doing of an act perfectly innocuous in itself to any person, if the doing of it simultaneously with an equally innocuous act done by another person, contributed to a result injurious to the plaintiff.

The conduct of each of the six defendant companies in the six actions above mentioned would have clearly amounted to actionable *injuria* to the plaintiff's reversionary interest in the land, if it had been sufficiently extended to produce a more substantial amount of its natural and inevitable consequences in the circumstances in which it took place. It was therefore not the intrinsic character of the conduct of each of the defendant companies that exempted it from liability at the suit of the plaintiff; and, in this aspect of it, the conduct of each of the defendant companies was clearly different in character from the kind of conduct which produces *damnum sine injuria* in all the cases in which it is recognized as essentially such. But the wrongful and consequently actionable character of conduct frequently depends upon the extent of it. It is so in regard to the conduct which, in the majority of such cases, produces an actionable nuisance. It is so also in regard to the use of some particular facilities or privileges which are open to everybody, or to a definite number of persons, such as the use of a public road, or the use of the water of a river by the riparian proprietors of the land which it flows past.

The common law permits the existence of *damnum sine injuria* in all those cases in which one man suffers a loss in the pursuit of his business, or in the use of his property, by the conduct of another person in the pursuit of his business, or in the use of his property, and in which there is not any trespass to any property of the person who suffers the loss; and the doctrine or maxim of the common law which is applicable to those cases is that the public benefit is to be preferred to any private profit. In other words the common law permits the existence of *damnum sine injuria* in such cases on the ground of public utility, in the sense of the greater good for the greater number of persons. In fact it may be said that the promotion of the public good, in the sense of the greater benefit to the greater number of the members of the community, is the basis upon which the common law regulates the exercise of all private proprietary rights, in all cases in which other persons may be affected by the exercise of them; and in this matter equity clearly follows the common law, when it grants an injunction to restrain conduct which would be practically a monopoly use by one or a few persons of a right common to everybody, or to a definite class of persons upon whom the common law confers it. The application of the doctrine of public utility may appear at first sight to be somewhat obscure in such

a case as Smith *v.* Kenrick,[1] in which the tenant of one of two adjoining coal mines was held to have acted strictly within his legal right when he removed a horizontal bar of coal in his own mine, in the course of the proper working of it, although the consequence was to allow an accumulated quantity of water, which had come from a natural spring, to flow into the adjoining mine and to damage it. But if the law had allowed the plaintiff in that case to recover compensation from the defendant, it would have awarded a preference to the private right of the plaintiff to work his coal mine in the manner most advantageous to him, as against the private right of the defendant to work his coal mine in the manner most profitable to himself. In order to make the defendant liable to compensate the plaintiff, it was necessary for the plaintiff to prove that the defendant had been guilty of a violation of a duty which he owed to the plaintiff. But the court held that the defendant did not owe any duty to the plaintiff to abstain from removing the horizontal bar of coal in his own mine, and therefore his right to remove it was equal in the estimation of the law to the right of the plaintiff to work his mine without interference from any other person. Nevertheless the plaintiff suffered a serious loss from the removal of the bar of coal in the defendant's mine; and if anything in the nature of a juristic justification must be found for the refusal of the law to confer a right of action for the loss sustained by the plaintiff, there does not appear to be any such justification more consistent with the law's general recognition and protection of private proprietary rights, than the doctrine that the public benefit is better served in such a case by a refusal to award a preference to one of two conflicting rights, than it would be by any attempt to discriminate between them, upon the basis of any supposed benefit to the public in consequence of the nature of the right to which the preference would be awarded. The same observations are equally applicable to the cases of Acton *v.* Blundell [2] and Chasemore *v.* Richards.[3]

But if the doctrine of public utility is to be invoked in support of the denial of a remedy by injunction in such cases as those of the actions brought against the six mining companies above mentioned, it involves the proposition that public utility requires that mining operations should be permitted to the detriment of agricultural or pastoral pursuits, wherever it is impossible to carry on both

[1] 7 C. B. 515. [2] 12 M. & W. 324. [3] 7 H. L. Cas. 349.

of them in the same locality without detriment to one of them. Such an application of the doctrine of public utility to the particular facts of those cases would permit a single person or company to carry on mining operations in a manner that would inflict injury on land used for agricultural or pastoral purposes. It would also logically permit any interruption of a tenant's use of land for agricultural or pastoral purposes, whenever the successful result of mining operations required it. The result of such an application of the doctrine of utility would introduce a discrimination in favor of the use of land for a special purpose which is now unknown to the common law, and which, in many cases, would probably be found to operate to the public detriment rather than to the public welfare. But this result seems nevertheless to be the inevitable alternative to a denial of a remedy by injunction to a reversioner in such cases as those above mentioned.

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HOBART, TASMANIA.